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No. 807.

IN THE

Supreme Court of the United States

October Term, 1927.

THE UNITED STATES,

Petitioners,

vs.

AMOS D. CARVER, S. E. TURNER, CLIFFORD N. CARVER, SCOTT BLANCHARD, P. B. BLANCHARD, JAMES B. PARSE, A. N. BLANCHARD, W. A. BLANCHARD.

Respondents.

On Petition for a Writ of Certiorari to the Court of Claims.

Brief For The Respondents In Opposition.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION.

Opinion Below.

The opinion of the Court of Claims (R., 13) is not yet reported.

Jurisdiction.

The original judgment of the Court of Claims was entered January 17, 1927 (R., 7). On March 14, 1927, defendants' counsel filed a motion for a new trial (R., 16). On December 19, 1927, said motion was overruled, and the Court entered an order modifying the judgment (R., 16). The petition for certiorari was filed February 25, 1928 (R., 16). The jurisdiction of this Court is provided by Section 3 (b) of the Act of February 13, 1925.

Concerning the Petition.

The two "Assignments of Error," stated in the petition (R., 3), are not specific but rather general, and the petition concludes with this sentence: "Although the case may be of no general importance, we do not feel justified in acquiescing in a judgment for that amount, which appears to be without anything to support it." This statement indicates that the Government's counsel have not had the opportunity to consider this case with the care the Court took with it. In any event, the petition does not properly reveal the reasons which actuated the Court of Claims in reaching its judgment. However, in the consideration of proposed findings, and the argument and a long motion for a new trial, the Court of Claims had this case under consideration for more than a year, and that Court had a good reason for the action it took, which we will endeavor respectfully to explain.

The Question Presented.

The question is, whether the Emergency Shipping Fund provisions of the Act of June 15, 1917 (c. 29, 40 Stat. 182), authorized the Court of Claims to render judgment in favor of plaintiffs for just compensation, on account of the Shipping Board assuming possession and control of plaintiff's ship, and ordering the cancellation of the ship's charter, under the circumstances presently to be stated—immediately following the presentation of the Statute involved.

The Statute Involved.

The provisions of the Act just mentioned are as follows *(see footnote):

> "The President is hereby authorized and empowered, within the limits of the amounts herein authorized:
>
> "(a) To place an order with any person for such ships or material as the necessities of the Government, to be determined by the President, may require during the period of the war and which are of the nature, kind and quantity usually produced or capable of being produced by such person.
>
> "(b) To modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material.
>
> "(c) To require the owner or occupier of any plant in which ships or materials are built or produced to place at the disposal of the United States the whole or any part of the output of such plant, to deliver such output or part thereof in such quantities and at such times as may be specified in the order.
>
> "(d) To requisition and take over for use or operation by the United States any plant, or any part thereof without taking possession of the entire plant, whether the United States has or has not any contract or agreement with the owner or occupier of such plant.
>
> "(e) To purchase, requisition, or take over the title to, or the possession of, for use or operation by the United States any ship now constructed or in the process of construction or hereafter constructed, or any part thereof, or charter of such ship.

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* The authority herein conferred upon the President was delegated to the Shipping Board under Executive Order of July 11, 1917, No. 2604 (R. S. 6).

"Compliance with all orders issued hereunder shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts placed with such person. If any person owning any ship, charter, or material, or owning, leasing, or operating any plant equipped for the building or production of ships or material shall refuse or fail to comply therewith or to give to the United States such preference in the execution of such order, or shall refuse to build, supply, furnish, or manufacture the kind, quantities or qualities of the ships or material so ordered, at such reasonable price as shall be determined by the President, the President may take immediate possession of any ship, charter, material or plant of such person, or any part thereof without taking possession of the entire plant, and may use the same at such times and in such manner as he may consider necessary or expedient.

"Whenever the United States shall cancel, modify, suspend or requisition any contract, make use of, assume, occupy, requisition, acquire or take over any plant or part thereof, or any ship, charter, or material, in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

"The President may exercise the power and authority hereby vested in him, and expend the money herein and hereafter appropriated

through such agency or agencies as he shall determine from time to time: *Provided*, That all money turned over to the United States Shipping Board Emergency Fleet Corporation may be expended as other moneys of said corporation are now expended. All ships constructed, purchased, or requisitioned under authority herein, or heretofore or hereafter acquired by the United States shall be managed, operated, and disposed of as the President may direct."

Statement of the Case.

Between March 19, 1917, and October 8, 1917, the plaintiffs expended the necessary money for the construction of a schooner called the "Betsey Ross." Before the vessel was completed (by a shipyard at Tacoma, Washington), the plaintiffs entered into a charter on August 30, 1917, with the Mutual Chemical Company of America, to transport to New York on this ship, a cargo of chrome ore from New Caledonia (some 800 miles northeast of Melbourne, Australia). Simultaneously with this charter, the plaintiffs entered into a conditional charter with Messrs. J. J. Moore and Company of San Francisco for the outward voyage, to take a cargo of lumber from Chemainus, British Columbia, to Melbourne (R., 8). Before undertaking this voyage which was so hazardous at that time, the plaintiffs desired the assurance of the Shipping Board, that they, the plaintiffs, would be permitted to carry out their charter to bring back the ore. Accordingly, before the ship sailed from Puget Sound, the plaintiffs applied to the Shipping Board for, and received, their written approval for carrying out this ore charter (R., 9). Thereafter the vessel took aboard sufficient lumber, and other supplies, to enable her crew to build trunks in, and otherwise condition, the ship for the transportation of the ore. A

part of this work was done during the outward voyage to Melbourne, and the material for thus equipping the ship cost the plaintiffs $5,889.35.

The vessel arrived in Melbourne March 9, 1918, was unloaded, conditioned, and ready to sail for New Caledonia on April 10, 1918. However, when the master applied a few days prior thereto for his clearance papers, he was told that his clearance was refused at the request of the United States Shipping Board (R., 3). It had developed that prior to April 5, 1918, certain officials of the Shipping Board and U. S. War Industries Board and of the British and Australian governments had entered upon discussions as to requiring the "Betsey Ross," and some other vessels, to return to an American port with a cargo of wheat. There were differences of opinion as to what action should be taken, and these negotiations continued until May 9, 1918. Accordingly, the Australian authorities continued to decline to grant clearance to the master of the "Betsey Ross," advising him from time to time that they were acting under the directions of the United States Shipping Board. On May 9, 1918, the plaintiffs were advised that the vessel was ordered by the United States Shipping Board to abandon her chrome ore charter, and that she would not receive her clearance from Melbourne unless she be loaded with wheat. Thus, the vessel's owners were left by the Shipping Board under the handicap described, and the consequent necessity of accepting the best terms which might be offered to them for a return cargo of wheat. But no terms were ever offered by the Shipping Board, or any other person or persons acting on behalf of the United States (*infra*, 15).

Pending the above, the vessel remained idle at Mel

bourne during the period of 30 days between April 10 and May 9, 1918, at the expense of the plaintiffs (R., 4). The fair and reasonable value of the vessel at that time was $500 per day (R., 4).

Shortly thereafter, on May 15, 1918, the plaintiffs, having the opportunity, accepted an offer of the Food Administration Grain Corporation, a commercial corporation, organized under the laws of Delaware (*infra*, p. 15), for the "Betsey Ross" to return to the United States with wheat (R., 4). The Food Administration Grain Corporation paid the plaintiffs for the transportation of said cargo of wheat $63,784.

The amount which the plaintiffs would have earned if they had been permitted to carry out their chrome ore charter would have been $177,000. The contract so provided.

The plaintiffs filed a petition for just compensation in the Court of Claims, under the provisions of the said Emergency Shipping Act, claiming the foregoing three items of loss, namely, (a) the $5,889.35 for the cost of building the ore trunks and otherwise conditioning the "Betsey Ross" for carrying the chrome ore; (b) $15,000 for the value of the said ship during the period of detention between April 10 and May 9, 1918, while she was held at Melbourne under orders of the Shipping Board; and (c) $113,216, the difference between what plaintiffs would have earned under the chrome ore charter, $177,000, and what they were paid by the Food Administration Grain Corporation, $63,784.

The Court of Claims entered judgment for the plaintiffs for the third item only, $113,216 with interest, and disallowed the first and second items on the ground that the plaintiffs were relieved from performing the chrome ore charter, and hence were not entitled to claim the other two items of their loss (R., 15).

REASONS WHY THE PETITION HEREIN SHOULD BE DENIED.

It is respectfully claimed by respondents that the petition herein should be denied for the following reasons:

I.

This appears to be the kind of case which was intended to be excluded from review on appeal by Paragraph 6 of Rule 38 of this court, because:

(1) The Emergency Shipping Fund provisions of the Act under consideration were repealed by Section 2, Chapter 250, of the Merchants Marine Act of June 5, 1920 (41 Stat. 988), and hence the question presented is not a live one in the sense that it involves the application of an existing statute.

(2) By reason of the six-year statute of limitations, no further suits similar to the one at bar may be commenced (*Jud. Code*, §156; 36 Stat. 1139), and furthermore there are no similar claims now in litigation (R., 3).

(3) The decision of the Court of Claims is entirely consistent with its interpretation of the statute involved, in other cases, particularly *Meyer Scale & Hardware Co. v. United States* (57 Ct. Cls. 261, which will be mentioned further below (*infra*, p. 16).

II.

The judgment of the Court of Claims is right in principle. The action taken by the Shipping Board was authorized by the statute which provided for just compensation.

We respectfully submit the Court of Claims was right for the following reasons:

(1) First, the action of the Shipping Board in holding the plaintiffs' ship in Melbourne for upwards of a month, and in directing the Australian authorities to refuse clearance to the ship, and ordering the cancellation of her charter, was an "order" for a ship within the meaning of Subsection "(a)" of the statute. The Government's counsel do not mention the application of this subsection, but by implication seem to say that it refers only to orders for the *construction* of a ship. However, the words of Subsection "(a)," "*to place an order* with any person *for such ships* • • • which are of the nature, kind and quantity usually produced or capable of being produced by such person," are not the words which would be employed to mean only an order for the *building* or *construction* of a ship. The word *build* and the word *construct* are so customarily employed in connection with ships that it is reasonable to suppose that one of these words would be used when its generally accepted meaning alone was intended. On the other hand, the word "produce" is a more comprehensive term, and in its usual sense applies to the act of supplying or making available for use a completed ship. Referring to a dictionary on the authority of *Nix v. Hedden* (149 U. S. 304), there will be found among other synonyms of the word *produce*, the words *supply* and *furnish*. Accordingly, the per-

sons intended to be included in this Subsection "(a)" of the act as capable of "producing" a ship, were not only those who could *build* but also those who could furnish or otherwise make available a ship for use.

(2) The foregoing interpretation is consistent with the next succeeding Subsection "(b)" of the statute, which expressly indicates a distinction between "building" and "production." And all doubt about the matter would seem to be removed by the wording of the paragraph immediately following Subsection "(c)," where it is shown that the "orders" referred to were intended to include the requirement "to *build, supply, furnish* or *manufacture*" as follows:

> "Compliance with all orders issued hereunder shall be obligatory on any person to whom such *order* is given, and such *order* shall take precedence over all other *orders and contracts* placed with such person. *If any person owning any ship, charter or material* * * * shall refuse or fail to comply therewith, or to give to the United States such preference in the execution of such order, *or shall refuse to build, supply, furnish, or manufacture the kind, quantities or qualities of the ships or material so ordered*, at such reasonable prices as shall be determined by the President, the President may take immediate possession, etc."

Accordingly, when the Shipping Board assumed control of the plaintiffs' ship, and ordered the suspension and cancellation of her ore charter, it was reasonably within the exercise of the authority conferred by Subsection "(b)" "to modify, *suspend, cancel* or requisition any existing or future contract for the building, *production*, or purchase of ships or material."

The Government's counsel cannot reasonably deny, though they do not admit, that Congress intended by the foregoing to provide that just compensation should be made for the suspension and cancellation of a contract for the "building" of a ship, but they contend in any event that Congress did not intend to accord the owner of a contract for the use of a completed ship, a like treatment. But in this, it appears that the Government's counsel are not supported by the debates in Congress concerning the provisions of the act at the time it was up for passage. These debates show it was the purpose of Congress to give to the Shipping Board, through the President, a sovereign power to do with ships, or ships under construction, *or contracts affecting either*, anything thought necessary for governmental purposes. There is no intimation that the owners of contracts for ships under construction were to be favored over the others.

The following remarks of the Chairman of the Appropriations Committee of the House is indicative of the unlimited scope of the act, and it will be noted that in his statements about the *suspension* and *cancellation* of private contracts, there is no suggestion that these terms were intended to apply only to contracts for ships in process of construction:

> "The proposed amendment which the House is asked to adopt is simply the rearranging the Senate amendment in more logical form and differs from it in four principal respects: First, it gives power to *suspend* contracts as well as to cancel, modify or requisition. In the Senate provision there was no authority to *suspend a contract between private parties*, which might interfere with the Government requisitioning *or requiring work to be done*."

* * * * *

> "This legislation is of a very radical, unique, and unusual character. It confers the most comprehensive powers *ever proposed* upon the President of the United States. It authorizes him to requisition the entire output of a factory, to take over ships, *to cancel contracts*, to assume contracts, *to suspend contracts*, to operate those ships, * * *" (Cong. Rec., Vol. 55, Part 3, p. 3015).

If the narrow interpretation sought to be placed on this statute by the Government's counsel were the correct one, this legislation would not be extraordinary at all—it would not be the slightest enlargement upon the 5th Amendment to the Constitution in respect of the obligation to make just compensation for the "taking" of private property.

Accordingly, if what has been said is so, it follows that the plaintiffs would be entitled to just compensation for their losses on account of the authority so exercised by the Shipping Board, under the final paragraph of the act which states:

> "Whenever the United States shall *cancel*, modify, *suspend*, or requisition *any* contract, make use of, assume, occupy, requisition, acquire or take over any plant or part thereof, or any ship, charter, or material, in accordance with the provisions hereof, it shall make just compensation therefor, * * *."

(3) Notwithstanding the foregoing, the further ground upon which the plaintiffs stand in respect of the authority conferred upon, and exercised by, the Shipping Board, is to be found in Subsection "(e)" of the Act. By this subsection the Shipping Board was authorized to *take* either the plaintiffs' ship or the "charter of such ship." The application of this subsection to the item of the claim for the value of the ship while she was held at Melbourne at the plaintiffs' expense

is self-evident. Certainly as to this item of loss, the Court of Claims had jurisdiction under Subsection "(c)" of the Statute, because private property, or the possession of it, may not be taken without compensation. This was not disputed in the Court of Claims. In fact, as the Court of Claims states in its opinion, the application of this statute to the whole claim was not disputed in the argument of the case before that Court (R., 15). The principal argument of the Government's counsel was that there was nothing due the plaintiffs on account of the Shipping Board retracting from its agreement and cancelling the ship's charter. Thus, while the Shipping Board admitted the retention of the ship and the order for the cancellation of her charter, they said that they did not *take* anything from plaintiffs, and therefore, to use the Board's own words, the plaintiffs' losses "were *damnum absque injuria.*" The plaintiffs' answer to this is the contention respectfully made that no cases are reported which better justify the application of the rule that a destruction of property may amount to a *taking* (*Duckett v. United States*, 266 U. S. 149, 151). The predicament of the plaintiffs, who were shipping merchants, in respect of the loss of their contract, is reminded of the statement in "The Merchant of Venice" (Act IV): "You *take my house*, when you do *take the prop* that does sustain my house."

(4) But there is another view of the application of this Subsection "(c)" which seems equally decisive of the merits of this controversy. The Shipping Board was clearly authorized by this law to take the ship's charter, that is, consistent with their own agreement already made with the plaintiffs, they were authorized to say to the plaintiffs, "We will pay you the same amount to bring back wheat in your ship, which she is to receive for bringing back the ore." But the Ship-

ping Board, instead of this, treated the plaintiffs in a most inequitable manner. They held the ship in Melbourne for thirty odd days, and then ordering the cancellation of her charter, left the plaintiffs in that distant port to meet their difficulties as best they might. In doing this the Shipping Board retracted from—we may say repudiated, its own written agreement with the plaintiffs that the ore charter might be carried out. Accordingly, the plaintiffs contend that what was clearly the Shipping Board's duty to the plaintiffs may be regarded, in a court of equity, as having been done, "upon the known principle that equity will, for the purposes of justice, treat that to have been done which ought to have been done" (*Taylor v. Longworth*, 14 Peters 172, 177). It may be noted that what the Court of Claims did was to allow the plaintiffs only the difference between the ore charter and what they were to receive for bringing back the wheat, eliminating all other items, so the Government cannot claim, and does not claim any inequity. The plaintiffs were entitled to this, and the Shipping Board, in honor of their own agreement, ought to have assumed this obligation then and there, as Congress authorized and intended they should do.

Concerning Authorities Cited in Petition.

Some authorities are cited in the Petition (R., 3), but we respectfully say that the rules laid down in these cases have no place for application in the case at hand, for reasons which will be briefly stated.

In the case of *Omnia Company v. United States* (261 U. S. 503), a claimant was denied compensation for the frustration of a contract which gave claimant the opportunity to purchase a large quantity of steel from a steel plant. The damages claimed were held to

be too remote under the circumstances that claimant had made no payments under the contract, and the United States had not had any direct dealings with claimant or its property. But the circumstances of the case at bar are essentially different. The Shipping Board held plaintiff's ship in Melbourne for a considerable period and ordered her charter to be cancelled in violation of an agreement, which plaintiffs had relied upon, and incurred heavy expenses in carrying out for more than five months.

In the case of *Berg v. United States* (269 U. S. 535), which is cited in the petition, there is no opinion by the Court.

The only possible application of the case of *American Smelting and Refining Company v. United States* (259 U. S. 75), relates to the question of duress. In pressing this point the Government's counsel contend that the Shipping Board was relieved from any obligations to plaintiffs, because the plaintiffs made an agreement with the Food Administration Grain Corporation to bring back wheat. But, in this the Government's counsel fail to take into consideration an important fact, as the Court of Claims correctly viewed it, namely, that no terms were offered by the Shipping Board, and there was nothing else the plaintiff could do, unless indeed it was to sit around with their ship indefinitely in foreign waters. The Grain Corporation was a commercial corporation organized under the laws of Delaware* (footnote), and it had no identity in fact or law with the Shipping Board, and in a legal sense it had no identity with the United States (*Bank of Georgia v. United States*, 22 U. S. 333), although

* The "Food Administration Grain Corporation" was organized under the laws of Delaware pursuant to Executive Order No. 2681 (August 14, 1917), under the provisions of the Food Control Act of August 10, 1917 (40 Stats., 279).

the United States owned the stock of the corporation. The Shipping Board was not a party to the agreement between plaintiffs and the Grain Corporation, and had nothing whatever to do with it. Accordingly, the plaintiffs had a right to take such hire as was offered by a third party without relinquishing their right to claim their immediate and direct losses occasioned by the Shipping Board's interventions. The rule in *American Smelting and Refining Company* case has no place for application because neither the Shipping Board nor any agent of the United States had any dealings with the plaintiffs here after the ore charter was ordered to be cancelled. The Board issued orders to the Australian authorities not to clear the ship unless she be loaded with wheat, and under that handicap left the plaintiffs to shift for themselves. Hence the situation in which the plaintiffs were placed is the same in principle as one in which a party is required to mitigate damages.

The decisions in *Friend v. United States* (56 Ct. Cls., 423), and *Union Petroleum Co. v. United States* (18 F. [2d] 752), have to do with facts quite similar to those in the *Omaha* case, and accordingly, the claims in those cases were held to be too remote.

Conclusion.

The judgment of the Court of Claims is consistent with the decision of that Court in one of the first cases which came before it involving an interpretation of the Act in question, namely, *Meyer Scale and Hardware Co. v. United States* (57 Ct. Cls. 26). While the facts in the *Meyer Scale* case are not similar to those under consideration, the Court of Claims in that case went exhaustively into the legislative history of the Act, stating that this was done in anticipation of other cases

to arise, requiring the application of the Statute. The Court's opinion in the *Meyer* case is consistent with its decision here; and in answer to the same arguments for the narrow construction contended for in the case at hand, the Court said:

> "The words *'modify,' 'suspend,' 'cancel'* and *'requisition' are each of plain, well-understood meaning and each has its proper function in the accomplishment of the intended purpose. Combined, they covered the whole field of necessary operations so far as contracts were concerned, to the end that they might be found necessary to the accomplishment of governmental purposes.*
> • • •
>
> "The Act in question provided for compensation in case the Government should exercise powers conferred as to *cancelling, modifying, suspending* or *requisitioning contracts*, taking over plants, etc., *and the measure* is *'just compensation.'*"

A somewhat similar act of Parliament has been construed to cover the losses from the cancellation of a contract, in a case wherein the claimant did not have the equities in its favor which exist in behalf of the plaintiffs here (*Elliott Steam Tug Co. v. The Shipping Comptroller* (1922), 1 K. B. 127).

The judgment of the Court of Claims is founded upon the principle that the plaintiffs are entitled to be placed in the position they would have been in if the Shipping Board had kept its agreement and not cancelled the ore charter. The judgment does not place the plaintiffs in this position by a wide margin, because they were allowed nothing for the expropriation of their ship in Melbourne, and other items of expense attributable directly to the Shipping Board's actions. However, the judgment is right in principle, and clearly the Government has no basis to complain of an in-

equity. The Shipping Board may have only intended to render an accommodation to the Grain Corporation, but they had no right to do this at the plaintiffs' expense. If they wanted this ship to bring back wheat, they should have paid what the services were worth, instead of cancelling the plaintiffs' charter and leaving them helpless. An implied promise arose under the circumstances irrespective of the Shipping Board's retraction from its own agreement.

For the reasons stated, it is respectfully asked that the petition be denied.

Respectfully,

FRANK E. SCOTT,
Attorney for Respondents.

The Munsey Building,
Washington, D. C., April, 1928.